KEJURUTERAAN ELEKTRIK USAHAMAJU SDN BHD

v.

ZILATMAS (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-453-1999]
1 DECEMBER 2000

CIVIL PROCEDURE: *Summary judgment - Sub-contractor's claim for payment under engineer's certificates for work done - Whether certificates were issued under a valid and subsisting performance bond - Whether performance bond a pre-condition to payment or a pre-condition for work done - Whether the issuance of a new performance bond a past consideration - Whether triable issues - Whether to be decided at trial proper - Rules of the High Court 1980, O. 14*

The plaintiff was the sub-contractor for the defendant for a development project on a certain piece of land. The plaintiff submitted eight claims for payment for work done. The claims were certified by the engineer appointed under the contract between the parties. The defendant settled the payments for the first six certified sums and partially paid for the seventh. That led to the plaintiff's claim for the sums due by way of an application for summary judgment under O. 14 of the Rules of the High Court 1980 ('RHC') before the senior assistant registrar ('SAR'). The SAR dismissed the application. Hence, this appeal by the plaintiff.

The defendant contended, *inter alia*, that the seventh and eight claims were made after the expiry of the performance bond given by the plaintiff. As such, work undertaken thereunder was illegal and the engineer's certificates were invalid. The plaintiff argued that the giving of the performance bond was for work done and not for payment. Nevertheless, the plaintiff had given a new performance bond thereafter and hence the defendant should not withhold payment.

Held:

[1] The issue of illegality as raised and the defendant's submissions on the validity of the engineer's certificates of payments were triable issues. Further, the defendant was able to show that the giving of the new performance bond by the plaintiff constituted past consideration whereas the plaintiff was unable to show strong, cogent and conclusive evidence that the giving of the new performance bond did not constitute past

consideration. From the submissions of both parties, it was clear that the matter should proceed to trial. The plaintiff's O. 14 application was unsuitable to the factual matrix of the present appeal.

[Appeal dismissed with costs.]

Case(s) referred to:

Ahmad Udoh & Anor v. Ng Aik Chong [1970] 1 MLJ 82 ***(refd)***
Anderson v. Glass [1868] 5 WW & AB 152 ***(refd)***
Anglo-Italian Bank v. Wells (and Davies) [1878] 38 LT 197 ***(refd)***
Ashmore, Benson, Pease & Co Ltd v. AV Dawson Ltd [1973] 1 WLR 828 ***(refd)***
Bolton v. Mahadeva [1972] 2 All ER 1322 ***(refd)***
Clarke v. Murray [1885] 11 VLR 817 ***(refd)***
Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor [1994] 2 CLJ 143 ***(refd)***
Costain International Ltd v. AG [1983] 23 BLR 48 ***(refd)***
Crump v. Cavendish [1880] 5 Ex D 22 ***(refd)***
Currie v. Misa [1875] LR 10 Ex 153 ***(refd)***
Cutter v. Powell [1795] 6 Term Rep 320 ***(refd)***
Daiman Development Sdn Bhd v. Mathew Lui Chin Teck [1981] 1 MLJ 56 ***(refd)***
Dane v. Mortgage Ins Corp [1894] 1 QB 54 ***(refd)***
Dungate v. Lee [1959] 1 Ch 545 ***(refd)***
Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 ***(refd)***
Guthrie Waugh Bhd v. Malaippan Muthucumaru [1972] 1 MLJ 35 ***(refd)***
Edwards v. Davis [1888] 4 TLR 385 ***(refd)***
Ewing v. Osbaldiston [1836] 2 My & Cr 53 ***(refd)***
Goodman v. Layborn [1881] Roscoe's BC (4th edn 162) ***(refd)***
Hanak v. Green [1958] 2 QB 9 ***(refd)***
Harman v. Scott [1874] 2 CA 407 ***(refd)***
Hermcrest plc v. G Percy Trentham Ltd [1991] 53 BLR 104 ***(refd)***
Hosier and Dickinson Ltd v. P & M Kaye Ltd [1971] 1 All ER 301 ***(refd)***
JM Wotherspoon & Co Ltd v. Henry Agency House [1962] MLJ 86 ***(refd)***
Levy v. Yates [1838] 8 A & E 129 ***(refd)***
Lewis v. Hoare [1881] 44 LT 66 ***(refd)***
Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor [1976] 2 MLJ 177 ***(refd)***
Menaka v. Lum Kum Chum [1977] 1 MLJ 91 ***(refd)***
Nassau Steam Press v. Tyler [1894] 70 LT 376 ***(refd)***
Northampton Gas Light Co v. Parnell [1855] 15 CB 630 ***(refd)***
Pacific Associates Inc v. Baxter [1990] 1 QB 993 ***(refd)***
Pao On v. Lau Yiu Long [1980] AC 614 ***(refd)***
Pavey and Matthews Pty Ltd v. Paul [1987] 162 CLR 221 ***(refd)***
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 ***(refd)***
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62 ***(refd)***
Planche v. Colburn [1831] 8 Bing 14 ***(refd)***
Rawley v. Rawley [1876] 1 QBD 460 ***(refd)***

Roberts v. Plant [1895] 1 QB 597 ***(refd)***
Robinson & Co v. Lynes [1894] 2 QB 577 ***(refd)***
Roscorla v. Thomas [1842] 3 QB 234 ***(refd)***
SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] 2 MLJ 31 ***(refd)***
Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21 ***(refd)***
Soh Eng Keng v. Lim Chin Wah [1979] 2 MLJ 91 ***(refd)***
Sumpter v. Hedges [1898] 1 QB 673 ***(refd)***
Sutcliffe v. Thackrah [1974] AC 727 ***(refd)***
Windhilll Local Board of Health v. Vint [1890] 45 Ch D 351 ***(refd)***
Wong Yoon Chai v. Lee Ah Chin [1981] 1 MLJ 219 ***(refd)***
Yeep Mooi v. Chu Chin Chua & Ors [1981] 1 MLJ 14 ***(refd)***
Yong Mok Hin v. United Malay State Sugar Industries Ltd [1966] 2 MLJ 286 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 10, 71
Contracts (Malay States) Ordinance 1950, s. 66
Housing Developers (Control and Licensing) Rules 1970, r. 12
Moneylenders Ordinance 1951, s. 8(b), (c)
Rules of the High Court 1980, O. 14, O. 18 r. 17

For the plaintiff - Yau Wai Leong; M/s Chan & Assoc
For the defendant - BS Sidhu (Sharon Sidhu with him); M/s BS Sidhu & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

At all material times the defendant was and is the main contractor engaged to build 20 units of double storey shop-lots and 838 units of industrial factories at Lots PT 24 and 458 in Mukim Batang Berjuntai (hereinafter referred to as the "project"). By way of a letter of award dated 1 May 1996, the defendant accepted the plaintiff as the sub-contractor to provide electrical, telephone and fire protection services (hereinafter referred to as the "works") to the project for a total sum of RM1,523,160.00. The terms of the contract between the two parties were contained in the Institution of Engineers Malaysia Conditions of Contract for Mechanical and Electrical Works (hereinafter referred to as the "IEM contract"). By virtue of the IEM contract, Swasta Sekutu (M) Sdn Bhd was appointed as the consultant engineer (hereinafter referred to as the "engineer") and that engineer is and was, at all material times, an agent and or an employee of the defendant. The engineer was expected to act fairly (*Sutcliffe v. Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; and *Pacific Associates Inc v. Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA) and

the engineer too owe a duty to the defendant (*Hosier and Dickinson Ltd v. P & M Kaye Ltd* [1971] 1 All ER 301 at 305). It seemed that the IEM contract was not executed between the parties but all the same both parties relied upon and substantially performed the terms and obligations as set out therein.

It was averred that the plaintiff was permitted by the defendant sometime in July 1996 to enter into the site of the project to carry out the works. The plaintiff proceeded with the works until 12 December 1998 and by that time the plaintiff submitted claims to the defendant progressively for the works that were said to be done. By 11 May 1998, eight (8) claims were submitted by the plaintiff to the defendant and the total sum as certified by the engineer came up to RM452,151.11. It seemed that the defendant made the necessary payments for the first six (6) certified sums and partially paid for the seventh (7th) certified sum.

By virtue of cl. 20.4 of the IEM contract, the defendant was supposed to pay all amounts certified by the engineer within 30 days from the issue of the certificate. The defendant, so it was said, failed to pay up in full and to pay on time the sums certified by the engineer under the seventh (7th) and eighth (8th) certificates dated 27 April 1998 and 3 September 1998 respectively. By letter dated 28 November 1998 the plaintiff sought for payment from the defendant and that letter was worded as follows (see encl. 15 of the affidavit of Lim Kim Teik affirmed on 16 October 1999 which enclosed that letter marked as exh. "LKT-3"):

By Fax And A.R. Registered

Re: Electrical, Telephone And Fire Protection Services For Proposed 20 Units Of 2 Storey Shophouses And 838 Factory Units On Lots 24 & 458, Mukim Batang Berjuntai, Daerah Kuala Selangor, Selangor Darul Ehsan – Payment Of Certified Claims

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Pursuant to Clause 20.4 of the I.E.M. contract, you are to pay us within 30 days from the date of issue of each certificate of payment. On almost all instances, you have delayed in paying us the amount certified by the Engineer, Swasta Sekutu (M) Sdn Bhd.

We would like to draw your attention to the 7th and 8th certificates of our works issued by the Engineer on 27th April 1998 and 3rd of September 1998. You have until now only paid us RM30,000.00 out of the total certified sum of RM119,402.93. We can see no valid reason for you to continually refuse to pay us the certified sums fully.

> We thus give you 14 days notice, pursuant to Clause 37.1 of the contract, that we are terminating the agreement with you. Without prejudice to the above, we also enclose our letter to the Engineer as a further and alternative notice to you that we are terminating the agreement on the ground of the Engineer's wrongful delay in certification.
>
> We will be writing shortly to address the status of the present work and the goods that we have ordered for this project.

It is said that a certificate must be clear, unambiguous and it certifies an existing condition which the certifier is aware of (*Costain International Ltd v. A.G.* [1983] 23 BLR 48 at 66). A certificate approving the contractor's account may, in certain circumstances, be construed as an expression of satisfaction (*Clarke v. Murray* [1885] 11 VLR 817, CA (Vict.); *Harman v. Scott* [1874] 2 CA 407, CA (NZ); and *Goodman v. Layborn* (1881) Roscoe's BC (4th edition) 162). But one must not be confused. A certificate can never be equated as an award by an arbitrator (*Northampton Gas Light Co. v. Parnell* [1855] 15 CB 630). It is still a question of fact whether the contract works are completed notwithstanding the issuance of a certificate (*Lewis v. Hoare* [1881] 44 LT 66, HL). Be that as it may, the engineer that issues the certificate must act impartially and independently *(Sutcliffe v. Thackrah (supra))* and the engineer too owes a duty to the defendant as an employer to carry out his duty with reasonable care and skill and towards this end the engineer will be liable for any loss occasioned by his own negligence *(Sutcliffe v. Thackrah (supra)).*

So much for a brief digression. I will now continue to narrate the facts.

It was the stand of the plaintiff that in so far as the seventh (7th) and eighth (8th) certificates were concerned, the plaintiff was seeking for the sum of RM89,402.93 and so the plaintiff proceeded by way of a summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC") for this sum by way of encl. 16, which application was heard by the learned senior assistant registrar ("SAR") in the person of Madam Hajjah Wan Azizon binti Ahmad. In due course, the learned SAR heard arguments by both parties and on 18 April 2000 she dismissed encl. 16 with costs. Aggrieved by the decision of the learned SAR, the plaintiff appealed to the judge in chambers as per encl. 28.

This judgment revolved itself on encl. 28 and it focussed on the seventh (7th) and eighth (8th) certificates issued by the engineer which the defendant refused to pay and the sum was said to be in the region of RM89,402.93.

The Law

If the plaintiff can clearly prove its claim and the defendant is unable to set up a *bona fide* defence or raise an issue which ought to be tried then the plaintiff is entitled to obtain summary judgment without a trial under Order 14 of the RHC (*Roberts v. Plant* [1895] 1 QB 597, CA; *Robinson & Co. v. Lynes* [1894] 2 QB 577; *Dane v. Mortgage Ins. Corp.* [1894] 1 QB 54, CA; *Nassau Steam Press v. Tyler* [1894] 70 LT 376; and *Edwards v. Davis* [1888] 4 TLR 385, CA). It is the duty of the judge to give judgment in favour of the plaintiff when the judge is satisfied that not only there is no defence but no arguable point to be argued on behalf of the defendant (*Anglo-Italian Bank v. Wells (and Davies)* [1878] 38 LT 197, 201 CA). According to Bramwell LJ in *Crump v. Cavendish* [1880] 5 Ex. D 22, CA, the defendant "is bound to show that he has some reasonable ground of defence to the action." Jessel MR in *Anglo-Italian Bank v. Wells (and Davies) (supra)* particularly at p. 199 of the report observed that an O. 14 "is intended to prevent a man clearly entitled to money from being delayed, where there is no fairly arguable defence to be brought forward." The crucial question to pose in adjudicating encl. 28 would be: were there triable issues as alleged by the defendant to warrant a full blown trial? For this exercise, I will examine the arguments of the parties not in its order of priority.

Whether The Giving Of A Valid And Subsisting Performance Bond Is A Pre-condition Of The IEM Contract For The Carrying Out Of The Works In The Project Or Whether It Is A Pre-condition To Payment?

It was argued by the plaintiff that:

(1) the giving of a performance bond is a pre-condition of the IEM contract for the carrying out of the works in the project; and that

(2) there are no terms in the IEM contract which stated that the performance bond is a pre-condition to payment even after the certificate of payment has been issued by the engineer,

and flowing from these arguments, it was pointed out that the defendant had no right under the IEM contract to withhold payments against the progress claims numbers seventh (7th) and eighth (8th). It was further submitted on behalf of the plaintiff that in the event the performance bond was considered to be a pre-condition of the IEM contract, it related only to the execution of the works. The plaintiff laid emphasis on cl. 23.1 of the IEM contract and it would be ideal to reproduce that clause. It was worded as follows (see exh. "LKT-1" marked "B" of encl. 15):

The Contractor shall as a condition precedent to the commencement of any work under this Contract, deposit with the Employer a performance bond of a bank or other surety for an amount specified in the Appendix for the due observance and performance of the Contract. Unless otherwise specified in the Appendix, the terms of the bond shall be in the form annexed to these General Conditions.

and it was submitted that it contained two parts, namely:

(a) that the performance bond was a pre-condition for the carrying out of the works; and

(b) that the function of the performance bond was simply to execute the IEM contract.

It was also argued on behalf of the plaintiff that the whole of cl. 23 of the IEM contract – to be precise the whole portion thereof, covered the situation where the defendant was given the right to claim payment under and through the performance bond. For convenience, I shall now reproduce cls. 23.2 and 23.3 of the IEM contract in succession:

23.2 The Performance Bond shall be valid until the Contractor has executed, complete and remedied defects in the Works in accordance with the Contract. No claim shall be made against the Performance Bond after the issue of the Defects Liability Certificate and the Performance Bond shall be returned to the Contractor within 14 days of the issue of the Defects Liability Certificate.

23.3 Whether or not the Performance Bond is stated by its terms to be payable on the demand of the Employer, the Employer shall not make a claim under the Performance Bond unless one of the following conditions is satisfied:

(a) the Contractor is in breach of the Contract and fails to remedy the breach within 42 days after receiving written notice from the Employer requiring him so to do. The notice shall state the intention to claim under the Performance Bond, the amount claimed and the breach relied upon, or

(b) the Employer and the Contractor have agreed in writing that the amount demanded is payable to the Employer, and the amount has not been paid within 42 days thereafter, or

(c) the Employer has obtained an award in arbitration under Clause 39 (Arbitration) and the amount awarded has not been paid within 42 days after the award, or

(d) the Contractor has gone into liquidation or is bankrupt.

In every case the Employer shall, when making the claim, send a copy to the Contractor.

Through an affidavit affirmed by Lim Kim Teik on 6 December 1999 as seen in encl. 22 of para. 10 thereof, the plaintiff averred that the inherent rights of the defendant (if any) would be restricted to the right to stop the works carried out by the plaintiff and the right to claim for the delay or the right to give notice to terminate the contract. The tenor of the plaintiff's submission was quite simple: once the certificate was issued by the engineer, the defendant must effect payment within 30 days after the issuance of the certificate.

The defendant, on the other hand, argued that the IEM contract did not specifically decide the issues of whether the giving of a valid and subsisting performance bond was a pre-condition of the IEM contract for the carrying out of the works in the project or whether it was a pre-condition to payment. These issues were said to be unclear and so the defendant submitted that those issues can only be determined after a full fledged trial where witnesses would take the stand and be cross-examined accordingly.

On performance bond, the defendant also relied on cl. 23.1 of the IEM contract and the defendant further relied on the letter of award dated 1 May 1996 which was exhibited as exh. "LKT 1" marked "A" in encl. 15 and the same letter was also exhibited as exh. "A" in encl. 20 where at para. 2 thereof the following recital appeared:

> 2. **Performance Bond**
> As required under the terms of the contract, you shall submit the Performance Bond of Five (5) Percent of the Contract Sum in the form of approved Bank Guarantee within Fourteen (14) days from the date hereof.

and using these as leverages, the defendant submitted that it was clear that the giving of a valid and subsisting performance bond at the time the works commenced and such works continuing until it had been executed and completed and for a period of six months after the expiry of the defect liability period was said to be a pre-condition of the IEM contract that must be adhered to in the execution of the IEM contract between the plaintiff and the defendant.

The defendant alluded to an affidavit in reply that was affirmed by a director of the defendant's company by the name of Shariffudin bin Shawal on 18 November 1999 as seen in encl. 20 particularly to paras. 10 and 13 thereof and it was again emphasised that the giving of the performance bond by the plaintiff played a crucial part because the validity and the subsistence of the performance bond was for the purpose of guaranteeing the following salient matters:

(a) as a guarantee by the plaintiff to the defendant for the execution and completion of works for a period of six (6) months after the expiry of the defect liability period; and

(b) to give to the defendant the right to receive damages by way of set-off for a period of six (6) months after the expiry of the defect liability period in the event the plaintiff were to commit any breach of its obligations in the execution and completion of the contractual works under the IEM contract.

It was next argued by the defendant that the non-existence of a valid and subsisting performance bond meant that the defendant had no guarantee whatsoever and had no right of set-off from the plaintiff in the event the plaintiff committed any breach of its obligations in the execution and completion of contractual works under the IEM contract. Now, O. 18 r. 17 of the RHC states as follows:

> Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.

and it does not define nor describe what type of claim may be pleaded as a set-off. It merely provides that where the defendant's claim for a sum of money is capable of being ascertained it can be pleaded and added as a defence and likewise it can even be added as a counterclaim. Indeed, Morris LJ in *Hanak v. Green* [1958] 2 QB 9, 26 aptly said that:

> The question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings.

Basically, a set-off is nothing more than a monetary cross-claim which also serves as a defence to the claim made in the action. In respect of debts or liquidated demands between the same parties, set-off would usually arise. In my opinion, the right to set-off a certain sum of money is maintainable irrespective of whether the amount is ascertained or otherwise provided the sum that is proposed to be set-off must have accrued at the commencement of the action (*Rawley v. Rawley* [1876] 1 QBD 460, CA). In *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62 at p. 68, Salleh Abas LP (as he then was) in refined language explained the characteristics of a set-off in this way:

> The characteristics of set-off as contained in Order 18 rule 17 are that (1) it is a cross-claim for a sum of money, ascertained or otherwise; (2) it is relied as a defence to meet the whole or part of the plaintiff's claim, and (3) that it is immaterial whether it is added or not as a counter-claim as long as it is included in the defence.

Earlier on, his Lordship Salleh Abas LP in the same case posed this question:

> Now what are our written laws or rules of court which deal with a defence of set-off so as to enable the court to make an order relating thereto?
>
> We have no statutes dealing with a defence of set-off as are available in the United Kingdom. Neither have the United Kingdom statutes on the subject been incorporated in our Civil Law Act 1956 which deals with the reception of English law in this country. Section 3(1) of this Act only enacts that 'the Court shall, in West Malaysia or any part thereof, apply the Common Law of England and the rules of equity as administered in England on the 7th day of April, 1956'. Clearly, equitable set-off is included in the expression 'rules of equity' which the Court is required to apply under the section. But the legal set-off which is based on statute is in no way included in the expression 'the Common Law of England' which we are required to apply. Thus, there being no Malaysian Statutes on the subject, we therefore hold that only equitable and not legal set-off is part of our law, and consequently the court can only deal with an equitable set-off.

And as to the meaning of set-off, his Lordship Salleh Abas LP in the same case at p. 66 lucidly defined the term as follows:

> A set-off is a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. A cross-claim is not necessarily a set-off, merely because the word used in the pleading is 'set-off'. Whether or not the plea is a set-off it has to be determined as a matter of law and substance. *Hanak v. Green* [1958] 2 Q.B. 9, 26. A cross-claim which is accepted as a defence of set off has the effect of extinguishing either the whole or part of the plaintiff's claim. See *In re A Bankruptcy Notice* [1934] Ch. 431, 437. But to constitute a set-off the sum of money meant as a cross-claim must from its nature and quality be such that it is proper to be dealt with as a defence to the plaintiff's claim and not as a separate cause or matter.
>
> At common law a right of set-off was not recognized despite the fact that a defendant had a valid claim against a plaintiff. Thus, in order to prevent imprisonment of such a defendant, two statutes, known as Statutes of Set-off, were passed in 1728 and 1734. Although these statutes and the subsequent statutes were repealed, the principle has been preserved by successive statutes even to this day. In addition to the statutory set-off, the court of equity has all along been in the habit of allowing a defendant to restrain a plaintiff from proceeding at law where in view of the defendant's cross-claim, the court thinks

that it is unjust for the plaintiff to proceed with his suit at law. This is known as 'equitable set-off' and it operates as Lord Cottenham, L.C. said where there is an equity which goes to impeach the title of the legal demand. *Rawson v. Samuel* [1841] Cr. & Ph. 161, 178; 41 E.R. 451. The fusion of the law and equity in 1873 does not affect this principle either.

It is pertinent to point out that the court in *Hermcrest plc v. G. Percy Trentham Ltd* [1991] 53 BLR 104 at 113, 25 Con LR 78 at 84, CA (England) held that the equitable doctrine of set-off arose purely by implication of law as a term of the contract.

Factually speaking, on the affidavit evidence, the plaintiff did not deny that:

(1) the performance bond had expired on April 4, 1998; and

(2) the plaintiff had failed to give a valid and subsisting performance bond in favour of the defendant upon the expiry of the performance bond on 4 April 1998, and for a further period of six (6) months,

and in the absence of a valid and subsisting performance bond, the defendant would be greatly handicapped in that it had no guarantees against works in respect of which claims were made by the plaintiff.

An argument was advanced on behalf of the defendant to the effect that as a result of the plaintiff's breach of the IEM contract, the works undertaken after 4 April 1998 must be presumed to be illegal and, consequently, the progress claims numbers seventh (7th) and eighth (8th) issued by the engineer must be construed to be null and void and of no effect and the defendant was thus under no obligation to pay the plaintiff the sum as claimed. Time and again the defendant stressed the following salient points:

(1) that the works undertaken and put into motion were not guaranteed by the performance bond and were illegal;

(2) that the engineer's certificates were null and void; and

(3) that the plaintiff had blatantly breached the IEM contract.

Broadly stated there are two types of illegality. The first would be an illegality as to its formation. The second would relate to an illegality as to performance. An illegality as to its formation envisages the situation where the contract may be illegal when it is entered into because that contract cannot be performed in accordance with its terms without the commission of an illegal act (*Levy v. Yates* [1838] 8 A. & E. 129; *Dungate v. Lee* [1959] 1 Ch. 545; and *Ewing v. Osbaldiston* [1836] 2 My. & Cr. 53). In regard to an illegality as to performance, a situation may arise where the illegality may be due to both or

one of the parties intending to perform the contract in an illegal manner and in such a situation the court would be reluctant to assist the parties involved in such an illegality.

The case of *Levy v. Yates (supra)* provides a classic example of a contract which was illegal at its inception. In that case there was a statutory rule that no play could lawfully be carried out within 20 miles of London without a royal licence – which licence could only be given in certain circumstances. In violation of that statutory rule, the theatre-owner and an impresario entered into a contract for the performance of a theatrical production. The court ruled that the contract was unenforceable and at p. 134 of the report the court said that "the agreement could not be carried into effect without a contravention of the law." On the other end of the scale, there is a case that goes by the name of *Ashmore, Benson, Pease & Co Ltd v. A.V. Dawson Ltd* [1973] 1 WLR 828 which provides an excellent example of a contract which was illegal as to its performance thereby barring either party from maintaining an action in respect of it. That was a case where the defendants agreed to transport two boilers belonging to the plaintiffs and the defendants proceeded to carry the boilers on lorries which could not lawfully carry the two boilers in question. Subsequently, it turned out that the two boilers were damaged in the course of transit. The owner of the two boilers then sued for damages and the claim was rejected. It seemed that the owner of the two boilers not only knew that the goods were being transported in an illegal manner but had actually participated in the illegality by assisting the defendants carrier to carry out the contract in an illegal manner. At the local scene, there is the case of *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck* [1981] 1 MLJ 56 where the Privy Council held that the vendor to the sale and purchase agreement could not "contract out" of the requirements of r. 12 of the Housing Developers (Control and Licensing) Rules 1970. Their Lordships of the Privy Council held that this was so purely on the basis of the interpretation of the rules, in particular r. 12 thereof. At p. 60 of the report, Sir Garfield Barwick said:

> It is observable that rule 12 does cover much of the relationship of vendor and purchaser in relation to the purchase and is mandatory so far as the appellant (referring to the vendor) is concerned.

Then there is the case of *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31, a decision of the Federal Court. There the Federal Court ruled that the appellants could not contract out of the Housing Developers (Control and Licensing) Rules 1970. Next, it would be the case of *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91 a decision of the Privy Council which originated from the Federal Court which was reported in [1973] 2 MLJ 154.

In that case, the appellant was a registered moneylender carrying on business under the name of AR PR M Firm. Through her attorney, she lent some money to the respondent on the security of a charge of certain lands belonging to the respondent. The loan was prepared by the attorney on behalf of the appellant personally. The appellant applied for an order for the sale of the lands to satisfy the principal sum and interest. The respondent objected to the application on the ground, *inter alia*, that, as the loan was not made in the registered name of the moneylender, the moneylender had contravened the provisions of ss. 8(b) and 8(c) of the Moneylenders Ordinance 1951. The Federal Court by a majority held that the agreement was forbidden by s. 8(b) of the Moneylenders Ordinance and was therefore void. The Federal Court also held by a majority that the agreement was forbidden by s. 8(b) of the Moneylenders Ordinance 1951 and was therefore void. By a majority, the Federal Court also held that the learned trial judge was right in the circumstances of the case in finding that neither the appellant nor her attorney was aware of the illegality of the transaction at the time of the execution of the documents and, that being the case, s. 66 of the Contracts (Malay States) Ordinance 1950 was applicable and the learned trial judge was right in ordering the return of $19,400.00 being the balance of the principal sum, to the appellant. The appellant appealed against the dismissal of her claim and before the Privy Council the respondent was given leave to cross-appeal against the decision of the Federal Court that he was liable for interest at 6% from the date of the filing of the action. The Privy Council held that the appellant had contravened para. (c) of s. 8 of the Moneylenders Ordinance 1951 and therefore the contract and the security were unenforceable. The Privy Council also held that since neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete faith, the appellant was entitled to restitution of the balance of the principal sum of $19,400.00. The Federal Court also held that the award of interest was solely the discretion of the court and as it had not been shown that the Federal Court committed any error of law in the exercise of their discretion, the Privy Council upheld their decision.

Another interesting point of law that needs to be restated is this: a party to an illegal contract and who had no knowledge of the illegality would be granted relief. A case in point would be that of *Ahmad bin Udoh & Anor v. Ng Aik Chong* [1970] 1 MLJ 82. That was a case where the Federal Court allowed the respondent to recover $1,500.00 because the parties were ignorant that they were executing an illegal agreement and the court ruled that s. 66 of the Contract (Malay States) Ordinance 1950 applied. At p. 84 of the report, Suffian LP remarked that:

> In the instant case there is no evidence that the plaintiff was in *pari delicto* and that he knew when he entered into the agreement that it was forbidden by law, the illegality of the agreement was discovered subsequent to the making of it, the claim for restoration of his money is not based on the illegal contract but dissociated from it and his action is not founded on dealings which are contaminated by illegality.

Salleh Abas FJ in the Federal Court case of *Yeep Mooi v. Chu Chin Chua & Ors* [1981] 1 MLJ 14 held that the appellant who had deposited money with a person who carried on a borrowing business in direct contravention of the Borrowing Companies Act 1969 (Laws of Malaysia Act 6) was entitled to recover the deposit under s. 66 of the Contracts (Malay States) Ordinance 1950 simply because she had no knowledge of the illegality of the business. At p. 17 of the report, Salleh Abas FJ succinctly said:

> Whatever the knowledge of the deceased was at the time of accepting the deposit, it is certainly clear that the appellant did not know that the deposit transaction was contravening any of the statutes we have considered here. Nor did she ever suspect that the transaction was unlawful by any other law. She placed her money on deposit in good faith, obtained a receipt for it duly signed by the deceased and the ninth respondent and subsequently received interest from the deceased. She only became concerned about the safety of her money when she learnt of the deceased's death. She asked the tenth respondent to return it to her but was refused and so she brought this action. She became aware of the fact only after the suit had started because the statements of defence filed by the respondent claimed that the transaction was void and unenforceable. In fact throughout the trial and appeals she maintained that the deposit was perfectly in order. In our view this case fits in squarely with the words of section 66 as an agreement which is 'discovered to be void'.

Wan Yahya J (as he then was) in *Soh Eng Keng v. Lim Chin Wah* [1979] 2 MLJ 91, in style, reiterated the principle of law as enunciated by the Privy Council in *Menaka v. Lum Kum Chum (supra)* in regard to the ramification of s. 66 of the Contracts (Malay States) Ordinance 1950. This was what Wan Yahya J (as he then was) said at p. 92 of the report:

> To my mind, this section has to be applied with care and is not open to indiscriminate use by unlicensed moneylenders whose claims have been defeated by reason of the contravention of the provisions of the Moneylenders Ordinance 1951. Section 66 of the Contracts Act is not intended to override those provisions of the Moneylenders Act which make contracts in moneylending transactions void but it is meant to provide some relief to a party whose right in an agreement have become unenforceable through no fault of his own making.

> I am of the firm opinion that the words 'discovered' and 'becomes' appearing in section 66 above are not superfluous words used by the legislators. On the contrary, they are words inserted in that section for a specific reason and that is to qualify or restrict the type of agreement to which that section will apply. As I have said in the earlier case, the term 'discover' here clearly indicates something which the parties were unaware of at the time of making the agreement and which they gained sight of or detected subsequently and the word 'becomes' refers to something not present when the contract was signed but came into being at a later stage.

But the courts would decide each case according to its own set of facts. Thus, Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court) in *Wong Yoon Chai v. Lee Ah Chin* [1981] 1 MLJ 219 refused to grant restitution in an action brought by the moneylender under s. 66 of the Contracts (Malay States) Ordinance 1950. At p. 221 of the report, his Lordship Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court) said:

> As a licensed moneylender for a period of years he could not have been ignorant of the fact that he had breached the Moneylender's Ordinance. In any event he has not said that he had no knowledge of the illegality.

In similar vein, Raja Azlan Shah Acting CJ (Malaya) (as His Majesty then was) in *Singma Sawmill Co. Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 in considering the validity of a tenancy entered into by the parties in contravention of the provisions of the National Land Code in perfect English said at p. 25 of the report:

> There is a clear intention on the part of the appellants to use the subject matter of the agreement, ie, the land on which the factory was created, for an unlawful purpose. The object of the express condition is that the land must be cultivated with rubber and pineapple; the category of land use is agriculture, and any unilateral conversion to industry is not permitted. Indeed neither party had power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and to defeat the law relating to land use. The appellants are deemed to have been aware of the illegality of the agreement when they entered it and therefore section 66 of the Contracts Act cannot assist them.

All these authorities on illegality are thought provoking and they can be considered, once again, in its correct perspective during the trial of this civil suit. For the present exercise, I ruled that the issue of illegality as raised was a triable issue which certainly warrant a full blown trial.

Incidentally, there are countless authorities on the subject of illegality which cannot be considered in this judgment for want of space and time. Be that as it may, I will proceed to consider the arguments of the parties.

Whether The Certificates Of The Engineer Can Be Considered To Be Valid Notwithstanding That Those Certificates Were Issued During The Span Of Time When There Was No Valid And Subsisting Performance Bond?

The defendant submitted that the plaintiff's seventh (7th) progressive claim was made on 4 April 1998 which was also the date for the expiry of the performance bond. It was also submitted that the seventh (7th) progressive claim was only received by the defendant on 8 April 1998, some four (4) days after the expiry of the performance bond.

But the plaintiff was quick on the uptake. It was argued on behalf of the plaintiff that even though the performance bond had expired on 4 April 1998, the defendant did not give notice of the termination to the plaintiff. In fact, so it was submitted, the defendant had proceeded to direct that the works be continued and that the claims for 8th, 9th and 10th works were in respect of works done after 4 April 1998. The plaintiff further submitted that due to the defendant's failure to give notice of termination, the defendant was estopped from relying on cl. 23 of the IEM contract.

In rebuttal, the defendant emphasised on cl. 23 of the IEM contract and it was submitted that under cl. 23.2 thereof the performance bond "shall be valid" until the contractor has executed, completed, and remedied defects in the works in accordance with the contract. Therefore it was submitted that under cl. 23.2 of the IEM contract the plaintiff has a contractual obligation to perform by ensuring that the performance bond was still valid and subsisting until the plaintiff has fully executed, completed and remedied the defects in the works in accordance to the IEM contract. It was further submitted on behalf of the defendant that the 7th progress claim was received by the defendant on 8 April 1998 and at that point of time there was no valid and subsisting performance bond given by the plaintiff to the defendant. That being the case, it was submitted on behalf of the defendant that the issue raised by the plaintiff on whether or not the defendant had given notice of termination was not an issue at all. Rather, so it was submitted, that the crucial issue of the day was whether the plaintiff had given a valid and subsisting performance bond after 4 April 1998 – a legal and contractual obligations as set out in the IEM contract for the plaintiff to fulfil.

It would be interesting to point out that there was a letter dated 14 August 1998 as exhibited in exh. "LKT 3" of encl. 22 wherein the plaintiff gave an undertaking to the defendant to the effect that the plaintiff would give a new performance bond to the defendant on 17 August 1998 but the plaintiff failed, refused and/or neglected to give a valid and subsisting performance bond to the defendant on 17 August 1998 as promised and that being the case, it was submitted that the plaintiff had failed to comply with the terms of the IEM contract. In my judgment, this piece of evidence would certainly come within the speech of Bramwell LJ in *Crump v. Cavendish (supra)* in that the defendant here had shown "some reasonable ground of defence to the action."

It was submitted on behalf of the defendant that, at all material times, the defendant had the right to cancel or withhold the payments in respect of the engineer's certificates of payments numbers seventh (7th) and eighth (8th). Two reasons were advanced for this:

(1) When the engineer's certificates of payments were issued, the plaintiff was in breach of the IEM contract because the plaintiff failed, refused and/or neglected to give a valid and subsisting performance bond to the defendant after 4 April 1998.

(2) The engineer only knew that the validity of the performance bond had expired after the certificates were issued. Until the plaintiff gave a new performance bond to the defendant, the certificates for progress claims numbers seventh (7th) and eighth (8th) were invalid. Once the plaintiff gave a new performance bond, the certificates for payments numbers seventh (7th) and eighth (8th) could be re-certified by the engineer.

and I have nothing to add to these submissions except to say that these kind of submissions would certainly entitle the defendant to their day in court. A trial should be the best remedy.

It was argued on the authority of *Yong Mok Hin v. United Malay States Sugar Industries Ltd* [1966] 2 MLJ 286 that the failure of the plaintiff to give a valid and subsisting performance bond has prejudiced the contractual right of the defendant to make deductions by way of liquidated damages. It had also prejudiced the defendant, so the submission went, to any right of set-off within a period of six (6) months after the expiry of the defect liability period.

This brings me to the crucial question of whether the plaintiff who has not provided a valid and subsisting performance bond – and so had not performed its duty under the IEM contract, was entitled to claim for payments under the seventh (7th) and the eighth (8th) certificates issued by the engineer? It is trite law that a party who does not perform his side of the bargain is not entitled to payment. A case in point would be that of *Cutter v. Powell* [1795]

6 Term Rep 320 where the facts showed that the law as propounded must be strictly adhered to. There the defendant had agreed to pay Cutter thirty guineas provided that Cutter proceeded, continued and did his duty as second mate in a vessel that sailed from Jamaica to Liverpool. The voyage began on 2nd August and Cutter, unfortunately, died on 20th September when the ship was 19 days short of arrival at Liverpool. Cutter's widow brought an action to recover a proportion of the agreed sum. The court refused to give judgment to Cutter's widow because by the terms of the contract the deceased was obliged to perform his part of the bargain before payment could be made. The fact that Cutter did not break his contract by dying in the mid-Atlantic, did not assist his widow at all. Another case in point is the case of *Bolton v. Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009. The plaintiff in that case contracted to install a central heating system in the defendant's house for the sum of 800 pounds. The plaintiff installed the system but it only worked ineffectively – indeed very poorly and the defendant refused to pay for the installation of the central heating system. The Court of Appeal held that the plaintiff could not recover anything. Yet another case in point would be the case of *Sumpter v. Hedges* [1898] 1 QB 673 where the plaintiff agreed to erect on the defendant's land two houses and stables for 565 pounds. The plaintiff did part of the work to the value of approximately 333 pounds and the plaintiff then abandoned the contract. The defendant had no choice but to complete the works and the court held that the plaintiff could not recover the value of the works done.

The law is forever developing and one must approach *Cutter v. Powell (supra)*, *Bolton v. Mahadeva (supra)* and *Sumpter v. Hedges (supra)* with care as there is now the principle which allows damages to be recovered for breach of contract or alternatively to recover reasonable remuneration on a quantum meruit for the work that has been done (*Planche v. Colburn* [1831] 8 Bing 14). Put differently, although the general rule states that a party who does not perform his full obligation under the contract is not entitled to payment for partial performance, yet if the aggrieved party accepts the partial performance, the other party may claim for reasonable remuneration on a quantum meruit or even claim for damages for breach of contract. These principles of law can only be put in the forefront in the course of the trial and not by way of an O. 14 application. Oral evidence must be led in regard to the damages for breach of contract, if any, and oral evidence too must be led to warrant a claim for quantum meruit, if any. Incidentally, the plaintiff in its statement of claim sought by way of an alternative a certain sum "being the unpaid balance of the total value of material and workmanship supplied" and the plaintiff too sought for damages. These claims can only be adjudicated upon after an open court trial.

Whether The Renewed Performance Bond Given By The Plaintiff Constitute Past Consideration?

It was undeniable, so said the defendant, that the performance bond had expired on 4 April 1998 and that the plaintiff had not renewed that performance bond. The plaintiff took an opposite view and its stand was quite simple: that under the IEM contract the giving of the performance bond was only a pre-condition to the carrying out of the works. A submission was made on behalf of the plaintiff to the effect that the plaintiff had given a new performance bond on 11 August 1998 and hence the defendant had no ground to unreasonably withheld payment in respect of progress claims numbers seventh (7th) and eighth (8th). It was also the submission of the plaintiff that the payment of RM30,000 by the defendant to the plaintiff on 24 September 1998 proved that the defendant had made part payment as certified by the engineer. As a leverage, the plaintiff relied on the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345 and that case held that if the contract did not state any term that gave the right of set-off to the employer, the employer's right of set-off was waived. Flowing from this, it was submitted on behalf of the plaintiff that there were no terms in the IEM contract that required the plaintiff to re-submit its claims and neither was there a directive to that effect issued by the engineer.

By way of a rebuttal, the defendant submitted that the plaintiff dragged its feet when the plaintiff took one year to inform the engineer in regard to the renewal of the performance bond and the calculation was based from 11 August 1998 when the performance bond was renewed to 14 August 1999 when its renewal was relayed to the engineer. And calculated from 11 August 1998 to 15 October 1999, it took the plaintiff one year and two months to send the renewed performance bond to the defendant. On these facts, the defendant argued that it was past consideration which constituted no consideration at all because it contravened the terms of the IEM contract. It was pointed out that the facts in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd (supra)* were distinguishable from the facts of the present appeal in encl. 28. In that case the contractor complied with all the agreed terms of the contract between the parties and therefore there was no ground whatsoever for the employer to deny the contractor's claim. Whereas in the present appeal, the plaintiff failed to comply with the terms and conditions of the IEM contract and, ironically, the plaintiff was unaware of its non-compliance with the IEM contract and it was for that reason that the defendant held onto the belief that it had good reasons to deny the plaintiff's claim. The plaintiff was unable to show by strong, cogent and conclusive evidence that the giving of a new performance bond by the plaintiff did not constitute past consideration. On the other end of the scale, the

defendant had shown that the giving of a new performance bond constituted past consideration and therefore not recognised under our law. All these constituted the submissions of both the parties, which submissions would mean that the matter should proceed to trial and the O. 14 application was unsuitable to the factual matrix of the present appeal.

The crucial question to pose would be: What is consideration? It is said to be a detriment to the promisee and/or a benefit to the promisor. Lush J in *Currie v. Misa* [1875] LR 10 Ex 153, particularly at p. 162 aptly described consideration in these apt words:

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other ...

Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co Ltd* [1915] AC 847 seemed to define consideration as the price requested by the promisor, in exchange for which the promisor's promise was bought. To be precise at p. 855 of the report, this was what Lord Dunedin said in that case:

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

It goes without saying that consideration is necessary to support a contract (ss. 10 and 26 of the Contracts Act 1950; and *Guthrie Waugh Bhd v. Malaippan Muthucumaru* [1972] 1 MLJ 35). It is also trite law to say and I so say that if the consideration for the contract is illegal, the whole contract is not enforceable (*Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 2 CLJ 143, SC; and *Windhill Local Board of Health v. Vint* [1890] 45 Ch D 351, CA). It is heartening to note that in the event the contract is unenforceable in law, the builder may still recover by way of restitution (*Pavey and Matthews Pty Ltd v. Paul* [1987] 162 CLR 221 (Australia); and *Pao On v. Lau Yiu Long* [1980] AC 614, PC).

However, consideration may be executed, and executory but not past. A consideration is said to be "executory" if the act or forbearance has not occurred. But once the act which constitutes the consideration has been performed, the consideration is described to be "executed", which means that the party has done that which was required of him. Whereas "past" consideration arises where the act or forbearance alleged to constitute the consideration predates the promise. The law on past consideration is quite simple and straight forward in that past consideration is not good consideration. Two old vintage authorities on past consideration immediately come to mind.

The first is the case of *Roscorla v. Thomas* [1842] 3 QB 234, 114 ER 496 and the facts may be stated as follows. The plaintiff in that case had purchased the defendant's horse. After the deal had been completed Roscorla demanded a promise that the horse was sound and free from vice. This was accordingly given. It subsequently transpired that the horse was vicious and Roscorla sued for breach of the promise. It was held that his action failed because he had given nothing for Thomas' promise. The contract for sale had been completed when Thomas had given his assurance and, consequently, the purchase could only be past consideration. There was, as such, no consideration to support Thomas' promise and the court held that it was unenforceable.

The second case would be that of *Anderson v. Glass* [1868] 5 WW & AB 152 and the facts may briefly be stated as follows. Glass had promised his overseer by the name of Anderson in regard to an increase in wages. The increase was to apply to the future and was also to be back-dated to a point before the promise. The question which the court had to consider was whether the promise of increased wages enforceable? The court held that the promise was only enforceable in part. The promise as to the future was enforceable because the consideration for it was the work which Anderson had performed after it. The promise of back-dated pay was, however, held not to be enforceable because the only possible consideration was work that had already been done and completed and so, such consideration was held to be clearly past and did not support the promise.

At the local scene, I need to refer to the judgment of that brilliant judge by the name of Suffian J (as he then was) in the case of *JM Wotherspoon & Co Ltd v. Henry Agency House* [1962] MLJ 86 where his Lordship in style observed at p. 87 of the report that:

> An agreement made without consideration becomes a contract if, but only if, in the words of section 26 (b) of the Contracts (Malay States) Ordinance No. 14 of 1950:
>
> > It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor.

Following the same pattern of thought would be the decision of Hashim Yeop A. Sani J (as he then was) in the case of *Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor*. [1976] 2 MLJ 177 at p. 181 where his Lordship aptly said that: "An agreement without consideration is void unless it comes under one of the exceptions in s. 26 of our Contracts Act 1950." Now, in considering the issue of past consideration it would be ideal to refer to s. 71 of the Contracts Act 1950 which enacts as follows:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.
>
> ILLUSTRATIONS
>
> (a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.
>
> (b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

and I must say that it does not deal with the situation of past consideration simpliciter.

It is certainly an interesting legal recourse to dwell on the concept of past consideration and the appropriate time would be at the trial proper. I propose not to answer the question posed under this head and the appropriate time would be during the trial of the present civil suit. It was my judgment that the question posed was in itself a triable issue that was not fit to be decided by way of an O. 14 application.

Conclusion

For the reasons adumbrated above, I dismissed encl. 28 with costs and I also made an ancillary order to the effect that the case be expeditiously fixed for hearing subject to the due observance of the RHC. I would certainly look forward to the trial of this civil suit.